

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35795

STATE OF IDAHO,)	2009 Unpublished Opinion No. 722
)	
Plaintiff-Respondent,)	Filed: December 14, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
KEVIN J. JACKSON,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Elmore County. Hon. Michael E. Wetherell, District Judge.

Order relinquishing jurisdiction, affirmed.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

SCHWARTZMAN, Judge Pro Tem

Kevin J. Jackson pleaded guilty to attempted domestic battery with traumatic injury and malicious injury to property pursuant to a binding Rule 11 plea agreement. Jackson's plea to the domestic battery charge was an Alford plea with regard to the "traumatic injury" element. He now appeals from the district court's order relinquishing jurisdiction, arguing that the order breached two implied terms of the plea agreement or, alternatively, that the court abused its discretion by relinquishing jurisdiction.

I.

BACKGROUND

Jackson was charged with domestic battery with traumatic injury in the presence of a child and malicious injury to property. Jackson and the State entered into an Idaho Criminal Rule 11(f)(1)(C)¹ plea agreement. The relevant provisions for this appeal are as follows:

1. CR-2007-2317 (Domestic Battery in the Presence of a child): The State will amend this charge to Attempted Domestic Battery with Traumatic Injury and dismiss the “presence of a child” enhancement. The Defendant will enter an *Alford* plea with regards to the “traumatic injury” element of the amended Information. The Defendant will admit the balance of the Amended Information.

a. Binding Sentence: On the above charge, a judgment of conviction will be entered. The Defendant will be sentenced to a period of incarceration not to exceed five years, with the first two being fixed, followed by three years indeterminate. The Court will retain jurisdiction over this sentence for a period of 180 days.

b. Pre-Sentence Investigation: The Pre-Sentence Investigation will be waived for purposes of sentencing. However, a Pre-Sentence Investigation will be completed prior to the Defendant’s RIDER review.

c. Post-Rider Recommendation: If the Department of Corrections finds that the Defendant is a candidate for probation, then the Court will place the Defendant on a period of probation not to exceed five years.

...

e. Domestic Violence Evaluation: The Defendant will not be required to obtain a domestic violence evaluation. Instead, the Defendant will agree to complete 52 weeks of outpatient domestic violence treatment when he is released.

f. Estrada Rights: The Defendant will retain his post-conviction right to remain silent. If the Defendant elects to remain silent, his silence may not be used against him for any purpose.

The district court, however, expressed reservations with accepting the agreement without reviewing a presentence report or Jackson’s criminal history. The State then related Jackson’s criminal history, of which it was aware, to the court and indicated it would submit an NCIC report prior to sentencing. After the State’s representations, the district court entered into a plea colloquy with Jackson, during which the following exchange took place:

Q. And do you understand that before I dispose of your case, I will order-- well, I will order a pre-sentence investigation be prepared before I make my determination as to sentencing after the rider; do you understand that?

A. Yes, Your Honor.

¹ Both the original and amended plea agreements cite Idaho Criminal Rule 11(d)(1)(C). However, 11(d)(1)(C) was amended, effective in 2007, and at the time the plea agreements were entered the equivalent rule was, and still is, 11(f)(1)(C).

Q. Do you understand that report could reveal any prior criminal record you might have and I will take that into consideration in making my final determination after the rider?

A. Yes, Your Honor.

After the colloquy, the court accepted Jackson's guilty pleas "subject to receiving the information with regard to the defendant's prior criminal record."

At the subsequent sentencing hearing, the district court required the plea agreement to be modified in a number of ways before it would accept the agreement. Relevant to this appeal, the district court did not want to be bound to the post-rider recommendation provision, stating,

I advised both counsel that I have never agreed to a provision such as that, but even though 90 percent of the time I follow the recommendations of the rider review committee, there have certainly have [sic] been instances where I have disagreed with them, although rare, and that I wouldn't be bound by what sentence I would give following a rider.

After making sure both counsel and Jackson agreed to and initialed the modified provisions, the court accepted the plea agreement. As modified the plea agreement reads in relevant part,

a. Binding Sentence: On the [charge of attempted domestic battery with traumatic injury], a judgment of conviction will be entered. The Defendant will be sentenced to a period of incarceration not to exceed five years, with the first two being fixed, followed by three years indeterminate. The Court will retain jurisdiction over this sentence for a period of 180 days.

b. Pre-Sentence Investigation: The Pre-Sentence Investigation will be waived for purposes of sentencing. However, a Pre-Sentence Investigation will be completed prior to the Defendant's RIDER review.

[provision c. deleted in its entirety]

....

e. Domestic Violence Evaluation: The Defendant will agree to complete 52 weeks of outpatient domestic violence treatment when he is released and complete a Domestic Violence Evaluation.

[provision f. deleted in its entirety]

The court sentenced Jackson according to the plea agreement and retained jurisdiction for 180 days to allow Jackson to complete the rider program.

Thereafter, the district court conducted a hearing at the end of the retained jurisdiction period to determine whether to place Jackson on probation or execute the five-year period of incarceration in the plea agreement. Although the court acknowledged that Jackson had performed well during the retained jurisdiction period and had made "some progress" and gained "some insight," it determined that probation was not appropriate based upon the information and history contained in the presentence investigation report. The court stated that the rider could not

overcome Jackson's criminal history and that Jackson needed to have additional programming in a structured environment. The court relinquished jurisdiction and ordered Jackson to serve his five-year sentence with two years fixed. Jackson thereupon asked whether he had the right to withdraw his guilty plea at that time based upon his perception that the district court's ruling was a rejection of the plea agreement. The district court clarified that the agreement as amended allowed for its ruling and did not constitute a rejection, thus Jackson could not withdraw his plea.

Jackson appeals from the order relinquishing jurisdiction, arguing that the district court breached implied terms of the plea agreement (1) to not take into account Jackson's prior criminal history in determining whether to relinquish jurisdiction and (2) to give genuine consideration to the Department of Correction's recommendation of probation. Alternatively, Jackson argues the district court abused its discretion when it denied Jackson probation.

II.

DISCUSSION

A. Violation of the Plea Agreement

Plea agreements are contractual in nature. *State v. Lutes*, 141 Idaho 911, 914, 120 P.3d 299, 302 (Ct. App. 2005); *State v. Doe*, 138 Idaho 409, 410, 64 P.3d 335, 336 (Ct. App. 2003); *State v. Fuhrman*, 137 Idaho 741, 744, 52 P.3d 886, 889 (Ct. App. 2002). Therefore, as with other types of contracts, the interpretation and legal effect of a clear and unambiguous plea agreement are matters of law reviewed *de novo*. *Lutes*, 141 Idaho at 914, 120 P.3d at 302; *Doe*, 138 Idaho at 410, 64 P.3d at 336. Whether a plea agreement has been breached is also a matter of law reviewed *de novo*. *State v. Jafek*, 141 Idaho 71, 73, 106 P.3d 397, 399 (2005); *State v. Barnett*, 133 Idaho 231, 234, 985 P.2d 111, 114 (1999). Both the express and implied terms of the plea agreement must be considered by the Court. *Lutes*, 141 Idaho at 914, 120 P.3d at 302. When a district court agrees to a plea agreement calling for retained jurisdiction, absent evidence to the contrary, the only implied term that can reasonably be inferred is that the district court will give genuine consideration to the Department of Correction's recommendation made at the conclusion of the retained jurisdiction period. *Id.* at 915, 120 P.3d at 303.

In this case, there was no implied term to not use Jackson's criminal history to deny probation as shown by the unambiguous language of the plea agreement as well as the in-court statements made by the district court to Jackson. The amended plea agreement completely struck the provision that bound the district court to the Department of Correction's

recommendation concerning probation, indicating the court was going to make its own determination without any restriction as to what the court could consider. Additionally, the court specifically told Jackson that it was going to take the presentence investigation report into account after the completion of his rider in determining his sentence and that the court would specifically consider any criminal history contained in that report.

We further hold that the court did not violate any implied term to give genuine consideration to the Department of Correction's recommendation. Although the court did state it was unlikely it would have given Jackson the rider opportunity had it had the presentence investigation report before it, the court nevertheless discussed Jackson's progress during the rider program. However, it ultimately decided that progress did not outweigh Jackson's extended history of domestic violence and need for additional programming in a structured environment. Therefore, the court genuinely considered the Department of Correction's recommendation, but declined to follow it based on Jackson's criminal history.

B. Abuse of Discretion in Denying Probation

The purpose of retained jurisdiction is to allow the trial court additional time to evaluate the defendant's rehabilitation potential and suitability for probation. *State v. Young*, 119 Idaho 430, 431, 807 P.2d 648, 649 (Ct. App. 1991); *State v. Chapel*, 107 Idaho 193, 194, 687 P.2d 583, 584 (Ct. App. 1984). We review sentencing decisions, including those where probation is an issue, for clear abuse of discretion which focuses on the criteria set forth in Idaho Code § 19-2521. Refusal to retain jurisdiction will not be deemed a clear abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under Idaho Code § 19-2521. *Chapel*, 107 Idaho at 194, 687 P.2d at 584.

The district court acknowledged that Jackson made progress during his rider program. However, the district court also considered Jackson's extensive history of domestic violence related offenses, including five reported violations of protection orders in the instant case. As stated by the presentence investigator, Jackson may not have problems following the rules in a structured environment but "it is once he is out in the community and in a relationship that the problems occur." Based on Jackson's domestic violence history, the district court did not abuse its discretion in finding Jackson required more programming in a structured environment to ensure he would not reoffend. We reject Jackson's argument that the district court acted in bad faith when it found Jackson's criminal history failed to overcome any progress made in the rider

program because the court was already aware of this history before ordering the rider. Although the court was given limited information of Jackson's criminal convictions by the prosecutor, a presentence investigation report gives more detailed information on each charge, which allowed the district court to take a more comprehensive look at Jackson's propensity for domestic violence.

III.

CONCLUSION

Because we hold the district court did not violate any express or implied provisions of the plea agreement and did not abuse its discretion in denying probation, we affirm the district court's order.

Judge GRATTON and Judge MELANSON **CONCUR.**